

Letter of Findings Number: 04-20130028
Sales Tax
For Tax Years 2009-11

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ISSUE

I. Sales Tax—Imposition.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-5-20; IC § 6-8.1-5-1; IC § 6-8.1-5-4; [45 IAC 2.2-8-12](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of sales tax.

STATEMENT OF FACTS

Taxpayer is an Indiana business filing as an S corporation. Taxpayer has two shareholders. Taxpayer operates a gas station that is also a convenience store. The Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer's business records. The Department determined that Taxpayer's records were inadequate. Taxpayer did not have daily cash register Z-tapes, original sales records, expense reports, and monthly sales recaps.

As a result of the Department's audit, the Department issued proposed assessments of additional sales and use tax based on the "best information available." The Department determined that Taxpayer had not collected and/or reported the proper amount of sales tax on its sales of diesel fuel, gasoline, and convenience store items. The Department also determined that Taxpayer had not reported the correct amount of use tax. The Department issued proposed assessments for the additional sales tax, use tax, interest, and ten percent negligence penalties for the 2009, 2010, and 2011 tax years. Taxpayer protested the imposition of sales tax. An administrative hearing was held, and this Letter of Finding results. Further facts will be supplied as required.

I. Sales Tax—Imposition.

DISCUSSION

The Department notes that all tax assessments are prima facie evidence that the Department's claim for the tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

During the audit, the Department requested original sales records, invoices, expense reports, and monthly sales recaps covering the Tax Years. Taxpayer did not provide any of those items requested. The audit progress report indicates that the Department made numerous requests for information. Without more complete or reliable original records, the auditor proceeded to develop the audit report based upon the "best information available." IC § 6-8.1-5-1(b) provides that "[i]f the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available."

It should be pointed out that, "Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC § 6-8.1-5-4. In addition, IC § 6-8.1-5-4(c) provides that, "A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times."

The Department assessed Taxpayer sales tax. IC § 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. IC § 6-2.5-1-2 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in [IC 6-2.5-4-1](#)... or that is described in any other section of [IC 6-2.5-4](#)." IC § 6-2.5-4-1(a) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." The retail merchant collects "the tax as agent for the state." IC § 6-2.5-2-1(b). "Retail merchants are required to collect sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used for an exempt purpose." [45 IAC 2.2-8-12\(b\)](#).

Accordingly, Taxpayer, as a retail merchant, has a duty to collect and remit sales tax on its sales of tangible personal property. When a retail merchant fails to collect and hold the taxes in trust for the state, the retail merchant is personally liable for the sales tax, interest, and penalties due to the state for those sales. After reviewing the scanty records Taxpayer made available, the Department determined that Taxpayer had not collected and remitted the proper amount of sales tax for these years. Based on the information available, the Department made assessments of sales tax based upon the additional sales of diesel fuel, gasoline, and convenient store items.

Taxpayer protests the imposition of sales tax related to these additional sales of diesel, gasoline, and convenience store items.

A. Convenient Store Food Items: Exempt Retail Sales.

Pursuant to IC § 6-2.5-5-20, sales of "food and food ingredients for human consumption" are exempt from sales tax. Taxpayer's convenient store sales items that would be considered exempt under this provision. Taxpayer on, its sales tax returns, reported a certain amount of sales as "exempt food item" sales because Taxpayer considered the transactions to be exempt under this provision.

After reviewing the Taxpayer's available documentation, the Department accepted the amount of Taxpayer's reported "exempt food item" sales for the 2010 and 2011 tax years. However, the Department determined that the Taxpayer had reported an amount reported for the 2009 tax years that was too high, and decreased the amount that Taxpayer reported as "exempt food item" sales for the 2009 tax year to fifteen percent of its convenient store sales.

Taxpayer asserts that it should be allowed to consider a greater percentage of its sales as "exempt food item" sales for the 2010 and 2011 tax years. Taxpayer maintains that the amount of "exempt food item" sales that it originally report for the 2010 and 2011 tax years were underreported by Taxpayer. Taxpayer argues that it should be allowed the same percentage of "exempt food item" sales for the 2010 and 2011 tax years that the Department allowed for the 2009 tax year.

However, it is the retail merchant's responsibility to retain the documentation that supports the amounts it used to determine tax owed. IC § 6-8.1-5-4(c). The Department requested additional documentation and analysis to support this position. When reviewing sales tax compliance, the Department naturally looks to a retail merchant's sales documents. In this case, Taxpayer was unable to supply sales documents at both the audit and protest level. Instead, Taxpayer invites the Department to adjust the numbers it originally reported making an argument based on equity that it should be entitled to claim that fifteen percent of its convenient stores sales were exempt food items.

However, the Department declines Taxpayer's invitation. Taxpayer has neither provided sales documentation to support the adjustment nor cited to any statutes, regulations, or case law that would allow the Department to make such an adjustment. Therefore, Taxpayer has not established that the proposed assessments are wrong, and has not met the burden imposed under IC § 6-8.1-5-1(c). Based upon the information available, the Department finds no reason to disagree with the audit's conclusion that the amounts originally reported for the "exempt food item" sales for the 2010 and 2011 tax years should not be adjusted.

Accordingly, Taxpayer's protest to the imposition of sales tax from not allowing a higher percentage of "exempt food item" sales in the 2010 and 2011 tax years is denied.

B. Convenient Store Food Items: Additional Purchase Records.

Since original sales transaction documentation was not available, the auditor reviewed the purchase documentation that Taxpayer had available at the time of the audit. The Department used the November 2011 purchase documentation as this was determined to be the only complete month's information available. Based upon an analysis of Taxpayer's purchase documentation compared to its reported sales transactions, the Department determined that Taxpayer had underreported its sales transactions. The Department determined that Taxpayer had only reported approximately forty-four percent of its sales in the 2011 tax year. The Department used this number to make adjustments to Taxpayer's reported sales for the 2009, 2010, and 2011 tax years.

During the hearing, Taxpayer presented additional purchase documentation for the 2009, 2010, and 2011 tax years. Taxpayer maintains that analysis of the complete purchase documentation results in a much lower assessment. Based upon the documentation presented, it appears that the adjustments made to Taxpayer's reported sales taxable sales should be re-evaluated. Therefore, the audit division is requested to review the audit report, to review the accompanying documentation, and to make whatever adjustments it deems warranted.

Accordingly, Taxpayer's protest of the Department's adjustments to its reported taxable sales is sustained subject to the findings of a supplemental audit. Therefore, Taxpayer's protest will be sustained to the extent that the supplemental audit of the additional documentation results in the audit division making an adjustment. However, Taxpayer's protest is denied to the extent that the supplemental audit of the additional documentation does not result in the audit division making an adjustment.

C. Diesel: Additional Purchase Records.

Since original sales transaction documentation was not available, the auditor reviewed the purchase documentation that Taxpayer had available at the time of the audit. When purchase documentation was not available for certain months, the Department made an estimate for those months. Based upon an analysis of Taxpayer's purchase documentation compared to its reported sales transactions, the Department determined that Taxpayer had underreported its diesel sales transactions.

During the hearing, Taxpayer presented additional purchase documentation for its diesel sales. Taxpayer maintains that analysis of the complete purchase documentation results in a much lower assessment because the Department analysis uses more gallons than were actually purchased. Based upon the documentation presented, it appears that the adjustments made to Taxpayer's reported diesel sales should be re-evaluated. Therefore, the audit division is requested to review the audit report, to review the accompanying documentation, and to make whatever adjustments it deems warranted.

Accordingly, Taxpayer's protest of the Department's adjustments to its reported diesel sales is sustained subject to the findings of a supplemental audit. Therefore, Taxpayer's protest will be sustained to the extent that

the supplemental audit of the additional documentation results in the audit division making an adjustment. However, Taxpayer's protest is denied to the extent that the supplemental audit of the additional documentation does not result in the audit division making an adjustment.

D. Gasoline: Additional Purchase Records.

Since original sales transaction documentation was not available, the auditor reviewed the purchase documentation that Taxpayer had available at the time of the audit. When purchase documentation was not available for certain months, the Department made an estimate for those months. Based upon an analysis of Taxpayer's purchase documentation compared to its reported sales transactions, the Department determined that Taxpayer had underreported its gasoline sales transactions.

During the hearing, Taxpayer presented additional purchase documentation for its gasoline sales. Taxpayer maintains that analysis of the complete purchase documentation results in a much lower assessment because the Department analysis uses more gallons than were actually purchased. Based upon the documentation presented, it appears that the adjustments made to Taxpayer's reported gasoline sales should be re-evaluated. Therefore, the audit division is requested to review the audit report, to review the accompanying documentation, and to make whatever adjustments it deems warranted.

Accordingly, Taxpayer's protest of the Department's adjustments to its reported gasoline sales is sustained subject to the findings of a supplemental audit. Therefore, Taxpayer's protest will be sustained to the extent that the supplemental audit of the additional documentation results in the audit division making an adjustment. However, Taxpayer's protest is denied to the extent that the supplemental audit of the additional documentation does not result in the audit division making an adjustment.

E. Gasoline: Profit Margin.

The Department also reviewed Taxpayer's reported monthly average gasoline "selling price." The Department compared Taxpayer's reported "selling price" per gallon to the "historical selling price" per gallon for a gas station in the Midwest as found at EIA.gov for each of the months in question. The Department found that Taxpayer's average monthly "selling price" ranged from one percent to nine percent below the "historical selling price" in 2009; ranged from three to ten percent below the "historical selling price" in 2010; and ranged from zero to seven percent below the "historical selling price" in 2011. Therefore, the Department determined that Taxpayer's reported monthly average gasoline "selling price" was not accurate and was underreported by Taxpayer. The Department made an assessment of additional sales tax that would be due from Taxpayer's underreporting of its gasoline "selling price."

Taxpayer protests that the "historical selling price" used by the Department reflects too high of a profit margin for Taxpayer's gasoline station. When reviewing sales tax compliance, the Department naturally looks to a retail merchant's sales documents. In this case, Taxpayer was unable to supply sales documents at both the audit and protest level. Instead, Taxpayer makes arguments of equity and presented two internet news articles to arrive at the conclusion that it should be entitled to a reduction of the Department's sales calculations. After review of the materials submitted by Taxpayer, the Department finds that these materials are not sufficient to establish Taxpayer's position.

However, Taxpayer has neither provided sales documentation to support the reduction nor cited to any statutes, regulations, or case law that would allow the Department to make such an adjustment. Therefore, Taxpayer has not established that the proposed assessments are wrong, and has not met the burden imposed under IC § 6-8.1-5-1(c). Based upon the information available, the Department finds no reason to disagree with the audit's conclusion that the amounts originally reported for the gasoline sales should be adjusted due to the underreporting of Taxpayer's "selling price."

Accordingly, Taxpayer's protest of the imposition of sales tax from including too high of a profit margin on its gasoline sales is denied.

FINDING

Taxpayer's protest to the imposition of sales tax from not allowing a higher percentage of "exempt food item" sales in the 2010 and 2011 tax years is denied, as discussed in subpart A. Taxpayer's protest of the Department's adjustments to its reported taxable sales is sustained subject to the findings of a supplemental audit, as discussed in subpart B. Taxpayer's protest of the Department's adjustments to its reported diesel sales is sustained subject to the findings of a supplemental audit, as discussed in subpart C. Taxpayer's protest of the Department's adjustments to its reported gasoline sales is sustained subject to the findings of a supplemental audit, as discussed in subpart D. Taxpayer's protest of the imposition of sales tax from including too high of a profit margin on its gasoline sales is denied, as discussed in subpart E.

Posted: 07/31/2013 by Legislative Services Agency
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